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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. TYRELL JAMES RAINEY, Defendant and Appellant.	E058265 (Super.Ct.No. FSB1103711) OPINION

APPEAL from the Superior Court of San Bernardino County. Annemarie G. Pace, Judge. Affirmed with directions.

Nancy L. Tetreault, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Michael Pulos, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Tyrell Rainey and Eric Moss, became angry when asked to leave a barbecue party they attended with Alyssa Zamorano, Moss's former girlfriend. Defendant told the hosts it was unwise to kick them out when they knew where the apartment was. Later, defendant, Moss, and Jermaine Allen, returned. Defendant banged on the door of the upstairs apartment, then ran downstairs until Sean Ceballos and Mauricio Guandique, one of the hosts, went downstairs. After a few blows were exchanged, Jermaine Allen stepped forward with a rifle and shot Sean Ceballos in the chest area, causing permanent paralysis. Defendant was charged with the attempted murders (Pen. Code, §§ 664, 187)[1] of Sean Ceballos and Mauricio Guandique, with special allegations.[2] A jury acquitted defendant of the count involving Guandique, but he was convicted of premeditated attempted murder of Ceballos, along with the special allegation that a principal was armed with a firearm. He was sentenced to a determinate term of four years and an indeterminate term of life with possibility of parole and appealed.

On appeal, defendant argues that the trial court failed to adequately instruct on premeditation under the natural and probable consequences. We will order the correction of the sentencing minutes and abstract of judgment, and otherwise affirm.

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] One of the allegations related to an enhancement for committing the offense while on bail. (§ 12022.1.) The defendant admitted this enhancement prior to the commencement of trial.

BACKGROUND

Mauricio Guandique (Mauricio), Walter Hampton and Aaron Gamboa lived in a second story apartment in Colton where they hosted regular barbecue parties on Tuesdays, to which they invited friends. On Tuesday, August 9, 2011, Mauricio and his roommates hosted a barbecue, to which Mauricio invited Michelle Zamorano and her sister, Alyssa. Alyssa invited Eric Moss, whom she had dated for a time the year before and with whom she had recently reconnected via social media. Michelle picked Alyssa up and they went to pick up Eric, who brought his friend Tyrell Rainey, the defendant. This was the first time either Michelle or Alyssa had been introduced to defendant.

Michelle had something to do so she dropped them off at the apartment complex where the party was being held and left. Eric had been to the apartment on the previous Tuesday for one of the regular barbecues. When the three of them arrived at the apartment, they went upstairs to say hello to Alyssa's friends and then Alyssa, Eric and defendant hung out downstairs. Eric and defendant were the only two African-Americans at the party. The party was a bring-your-own-beverage affair, and Alyssa, Eric, and defendant had not brought any, so they went across the street to purchase some drinks. When they returned, they hung out downstairs for the entire time.

Sean Ceballos was at the party, as well as Isaac Fonosch, Aaron Gamboa, Gabriel Esquibel, Gilbert Salazar, and Mauricio Guandique, among others. When Sean arrived at approximately 9:30 or 10:00 p.m., he saw there were three people standing at the bottom of the stairs. As it became dark, Alyssa and Eric went upstairs so Eric could use the

bathroom. While they were upstairs, someone, possibly Mauricio Guandique, offered Eric some Bacardi and poured it in a cup for him. Then they went back downstairs.

Eric went back upstairs later, for a second time. While in the apartment, he tripped, and spilled his drink on Mauricio's female cousin. Eric apologized, but Mauricio and Gilbert Salazar got upset. Mauricio and Gilbert were tense and upset because Eric had tried to get some Bacardi from Gilbert, and became more so when Eric spilled the drink on his cousin. Mauricio and Gilbert yelled at Eric, who went back downstairs. Eric told Alyssa he had spilled a drink on someone and had apologized, but did not mention Mauricio and Gilbert challenging or arguing with him about the incident.

Mauricio called Michelle Zamorano and told her to pick up Alyssa and her friends, because the two people Alyssa had brought were being rude. Alyssa also called Michelle. A few minutes later, Mauricio and Gilbert went outside, having decided to tell them (Eric and defendant) to leave. Gilbert demanded to know who finished off his bottle of liquor. Eric explained he had done it because he had been served a cup earlier and did not think it was a problem. Mauricio told them they had to leave.

Soon, an argument between Mauricio, Gilbert, Eric, and defendant followed; Mauricio and Gilbert were mad. Gilbert was assertive and raised his voice. During the exchange of heated words, Eric stated that he and defendant were from the "hood," and defendant claimed he was from North Riverside. Gilbert told defendant that he should go back and not return. Defendant responded by saying words to the effect that they should not come at him, or kick them out, when he (defendant) knew where they (Mauricio and

his friends) lived. This was taken as a threat. By the time Michelle arrived, the men were yelling, so Walter pushed Mauricio back while Alyssa tried to push Eric into the car.

In the car, Eric and defendant talked. Defendant said if he did not get a phone call apologizing for the disrespect from either one of Michelle's friends, specifically Mauricio or Gilbert, he would "take care of it." Defendant also said that all he had to do was make a call, and he would not have to be there to take care of it. Eric also was upset because he had been disrespected, but he seemed to calm down when they reached his residence. Michelle told them to let it be, but defendant wanted a phone call. Michelle was upset because they were threatening her friends and asked them if they were going to kill her because she was going to defend her friends. Defendant told Michelle that girls like her get into trouble and get hurt for protecting their friends. After dropping off Eric and defendant, Michelle received a call from someone at the party, so she left that location and went to the party after dropping Alyssa off at a girlfriend's residence.

In the meantime, Eric Moss went into his residence. Approximately ten minutes later, Eric received a telephone call from defendant, instructing him that they were going back over the apartment, and telling Eric to meet him out front. Eric walked over to the defendant's apartment (which was nearby), where defendant was waiting with his friend Jerome Allen. Defendant was wearing the same clothing, but now had a black beanie on his head. Jerome wore black clothing, including a hoodie, and carried something wrapped in a towel. Defendant's girlfriend, Erica Guillen, picked up the three men in her

vehicle. Someone told her to open the trunk, which she did. Defendant and Eric gave her directions to the apartment building where the party had been held. When they arrived, someone removed a weapon from the trunk of the car.

When Michelle arrived at the apartment, Sean Ceballos, Aaron Gamboa, and Isaac Fonosch, as well as Mauricio and Gilbert were still at the party. Mauricio wanted to talk to Michelle about what happened. They went into a bedroom and closed the door to talk. A short time later, people at the party heard three loud bangs, like someone banging on a wall or kicking the door. Gilbert opened the door and looked out, but no one was there, so he closed the door. Then Sean Ceballos opened the door, saw no one, and decided to find out who it was.[3] According to Eric, the person who went upstairs, banged on the door three times, and ran back down, was defendant.

Sean, followed by Mauricio, went down to the bottom of the stairs where they saw the silhouettes of three people in the dark. Eric Moss admitted that the three people were himself, the defendant, and Jermaine Allen. Although Mauricio did not recognize them, he could tell that the three people were African-American. Sean asked if they were the people who had banged on the door. The person standing in the middle, Jermaine Allen, wore a white hockey mask and carried a rifle. Defendant asked where the loud guy with the tattoos was, referring to Gilbert, who had tattoos and had not worn a shirt at the party.

[3] After the party, Mauricio noticed damage to the apartment door frame that was not present previously.

Then, the person on the left of the threesome took a swing at Sean, hitting him in the face, while the person on the right swung at Mauricio. Sean told the gunman that this was not his beef, he did not know them, they did not know him, and he turned to walk away. As he turned to leave, he felt a gun make contact with his stomach, heard a gunshot, and fell to the ground. The shooter was the person wearing the mask. As a result of the gunshot, Sean was paralyzed and has no sensation below his chest.

Defendant, Eric Moss, and Jermaine Allen ran to Erica's car, and went back to defendant's residence after dropping off Jermaine. Detective McFarland conducted interviews of witnesses, including Eric Moss, who initially lied about being in Orange County at the time of the shooting, but eventually admitted going back to the party with defendant and Jermaine, and named Jermaine as the shooter.[4]

Defendant was eventually charged by way of an amended information with the attempted murders of both Sean Ceballos (count 1) and Mauricio Guandique (count 2). (§§ 664, 187, subd. (a).) In connection with each count, it was further alleged that a

[4] We have watched the video from the surveillance of the parking lot of the apartment building. (Exh. 131.) The five minute video shows a car driving up to the gate of the complex, three men exiting the vehicle, one of those men, who wore a white shirt, removing an object from the trunk of the vehicle, and then all three men entering the complex through the pedestrian gate. It is interesting that Eric Moss, who protested his ignorance of any plan to shoot anyone, was apparently the only person wearing a white shirt. Jermaine Allen was wearing all black. The video was played for the jury.

principal was armed with a firearm in the commission of the crime (§ 12022, subd. (d)), and that the crime was committed while defendant was free on bail.[5] (§ 12022.1.)

On the first day of the jury trial, defendant admitted the on bail enhancement as to both counts. The jury convicted defendant of the attempted murder of Sean Ceballos, found true the allegations that the defendant acted willfully, deliberately and with premeditation, and that a principal was armed with a firearm. Defendant was acquitted on count two and the attendant special allegations were found to be not true.

Defendant was sentenced to the indeterminate term of life with possibility of parole for the attempted murder, with two year enhancements each for the firearm allegation, and the on-bail enhancement, which were ordered to run consecutive to the term for the attempted murder. Defendant timely appealed.

DISCUSSION

1. *The Jury Was Properly Instructed on Aider-Abettor Principles Relating to Attempted Murder Which Is Premeditated.*

On appeal, defendant raises a single issue challenging the adequacy of the jury instruction as to the premeditation finding. Defendant does not challenge the propriety of the Judicial Council of California Criminal Jury Instructions (CALCRIM) defining attempted murder or the principles of aider-abettor liability. Specifically, he argues that the jury should have been instructed that it was required to find that Jermaine Allen, the

[5] Jermaine Allen was also named in the amended information, but Jermaine's case was dismissed by way of a motion for acquittal pursuant to Penal Code, section 1118.1, at the close of the People's case-in-chief.

actual perpetrator, premeditated the attempted murder, and that the jury was erroneously instructed under the natural and probable consequences doctrine for attempted murder.[6] We disagree. There is no requirement that the jury be instructed that the actual perpetrator have premeditated the attempted murder.

a. *Standard of Review Applicable to Asserted Instructional Error.*

It is well settled that the trial court must instruct on the general principles of law that are closely and openly connected to the facts and that are necessary for the jury's understanding of the case. (*People v. Jennings* (2010) 50 Cal.4th 616, 667, citing *People v. Carter* (2003) 30 Cal.4th 1166, 1219.) In addition to its general duty to instruct on the law, the court has the correlative duty """"to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues.' [Citation.]""" (*People v. Watie* (2002) 100 Cal.App.4th 866, 883, quoting *People v. Barker* (2001) 91 Cal.App.4th 1166, 1172.)

A court has a duty, even in the absence of a request, to instruct on the general principles of law relevant to the issues raised by the evidence (*People v. St. Martin* (1970) 1 Cal.3d 524, 531), so a claim that the court failed to instruct on applicable principles of law is reviewed de novo. (*People v. Berryman* (1993) 6 Cal.4th 1048, 1089,

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[6] Our review of the adequacy of the jury instructions is necessarily limited because the parties waived the right to have the court reporter take down the oral instructions. We interpret this as a forfeiture of any issue challenging the oral delivery of the instructions and review only the correctness of the CALCRIM instructions on the issue.

[overruled on a different ground in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1]; see also, *People v. Hamilton* (2009) 45 Cal.4th 863, 948.)

b. *The Instructions for Attempted Premeditated Murder Were Proper*.

The court read[7] CALCRIM No. 600, explaining the elements of attempted murder, CALCRIM No. 601, explaining the concepts of deliberation and premeditation, CALCRIM No. 400, explaining the general aiding and abetting principles, CALCRIM No. 401, regarding the intended crimes for which an aider and abettor may be held guilty, as well as CALCRIM No. 403, regarding the natural and probable consequences doctrine where only a non-target offense was charged. In connection with this particular instruction, the jury was instructed that before it could find defendant guilty of attempted murder under a natural and probable consequences theory, it must decide whether he was guilty of assault with a firearm (CALCRIM No. 403). The jury did not find defendant guilty of assault with a firearm, and there was no objection to the instruction as worded.

Defendant was charged with attempted murder, pursuant to sections 664, subdivision (a), and 187. Section 664, subdivision (a), provides that, as a general matter, a person guilty of attempted murder must be punished by imprisonment for five, seven, or nine years. However, "if the crime attempted is willful, deliberate, and premeditated murder, . . . the person guilty of that attempt shall be punished by imprisonment in the state prison for life with the possibility of parole." (*Ibid.*)

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[7] Because the reading of the instructions was not reported, we assume that the CALCRIM instructions included in the Clerk's Transcript were actually read.

Section 664, subdivision (a), does not require that an attempted murderer have personally acted willfully and with deliberation and premeditation, even if he or she is guilty as an aider and abettor. (*People v. Lee* (2003) 31 Cal.4th 613, 616 (*Lee*).) The Legislature has determined that an attempted murderer who is guilty as an aider and abettor, but who did not personally act with willfulness, deliberation, and premeditation, is sufficiently blameworthy to be punished with life imprisonment, where the natural and probable consequences doctrine does not apply. (*Lee, supra,* 31 Cal.4th at p. 624.) Instead, section 664, subdivision (a) requires "*only* that the *murder attempted* must have been willful, deliberate, and premeditated, *not* that the attempted murderer *personally* must have acted willfully and with deliberation and premeditation." (*Lee, supra,* 31 Cal.4th at p. 622, some italics added.) The jury is not required to find that an attempted murderer personally act willfully and with deliberation and premeditation, even if he or she is guilty as an aider and abettor. (*Lee, supra,* 31 Cal.4th at p. 616.)

Section 664 does not distinguish between an attempted murderer who is guilty as a direct perpetrator and an attempted murderer who is guilty as an aider and abettor, and not once requires of an attempted murderer personal willfulness, deliberation, and premeditation. (*Lee, supra,* 31 Cal.4th at p. 622.) Importantly, in *Lee,* the California Supreme Court applied section 664, subdivision (a) to direct aiders and abettors. (See, *People v. Chiu* (2014) 59 Cal.4th 155, 162.) In that case, the court observed that aiders and abettors may still be convicted of first degree premeditated murder based on direct aiding and abetting principles, although such a confederate could not be convicted of first

degree premeditated murder under the natural and probable consequences doctrine. (*Chiu, supra,* 59 Cal.4th at pp. 166-167.)

Further, because the premeditation and deliberation elements of attempted murder constitute a penalty provision, increasing punishment for attempted murder beyond the maximum otherwise prescribed, there is no requirement that an individual have personally acted with willfulness, deliberation, and premeditation in order to be punished to life imprisonment as an aider and abettor. (*Lee, supra,* 31 Cal.4th at p. 620.) Section 664, subdivision (a) does not require that an attempted murderer personally act with willfulness, deliberation, and premeditation. (*Lee, supra,* 31 Cal.4th at p. 626.) However, where the natural and probable consequences doctrine does apply, an attempted murderer who is guilty as an aider and abettor may be less blameworthy. (*Id.*, at pp. 624-625.)

Trial courts have a sua sponte duty to instruct jurors on the natural and probable consequences doctrine, "when the prosecution has elected to *rely* on the 'natural and probable consequences' theory of accomplice liability and the trial has determined that the evidence will support instructions on that theory." (*People v. Prettyman* (1996) 14 Cal.4th 248, 269; *People v. Hoang* (2006) 145 Cal.App.4th 264, 273.) The natural and probable consequences doctrine is only applicable when the prosecution seeks to hold a defendant liable as an aider-abettor for a crime other than the actual target offense, on the theory that the crime committed was the foreseeable, natural and probable consequence of the target offense. (*Prettyman, supra,* 14 Cal.4th at pp. 260-262; see also, *People v.*

Medina (2009) 46 Cal.4th 913, 920.) Whether an additional offense is a natural and probable consequence of a planned offense is a factual question to be resolved by the jury. (*People v. Cummins* (2005) 127 Cal.App.4th 667, 677.)

The natural and probable consequences doctrine is not implicated when liability is based on a defendant's conduct in giving aid or encouragement with knowledge of the criminal purpose of the direct perpetrator and with an intent or purpose of committing or encouraging or facilitating the commission of that crime. (*Lee, supra,* 31 Cal.4th at p. 624.) The instructions on the "natural and probable consequences" doctrine are required only when the prosecution has elected to rely on that theory of liability, and then, only when substantial evidence supports the theory. (*People v. Prieto* (2003) 30 Cal.4th 226, 252, citing *People v. Sakarias* (2000) 22 Cal.4th 596, 627.) In other words, where the evidence shows the defendant directly aided and encouraged the perpetrator's act of attempting to murder another, the defendant is directly liable for attempted murder as an aider-abettor without resort to the natural and probable consequences doctrine.

Recent cases have upheld the correctness of the CALCRIM instructions defining the elements of attempted murder. (See, *People v. Lawrence* (2009) 177 Cal.App.4th 547, 557.) Defendant does not argue that the language of the CALCRIM instructions misstates the law. Defendant also does not argue that the CALCRIM instructions explaining the liability of an aider-abettor misstate the law. He only argues that governing law requires the trial court to instruct the jury that it must find that Jermaine Allen, not the defendant, shot the victim willfully, deliberately, and with premeditation,

citing *People v. Favor* (2012) 54 Cal.4th 868, 879 (*Favor*). However, we are unable to find such a legal requirement.

In *Favor*, on which defendant relies, the defendant was charged and convicted of two counts of robbery, as an aider and abettor, and attempted murder, on the theory that the nontarget offenses of attempted murder were a natural and probable consequence of the target offenses of robbery, which defendant had aided and abetted. The defendant argued that the trial court erred in failing to instruct the jury on the natural and probable consequences doctrine as to the nontarget offense of attempted willful, deliberate, and premeditated murder, relying on an appellate decision in *People v. Hart* (2009) 176 Cal.App.4th 662, in which the reviewing court held that the trial court must instruct that the jury must find the attempted premeditated murder, not just attempted murder, was a natural and probable consequence of the target offense. (*Favor, supra,* 54 Cal.4th at pp. 872, 875.)

The California Supreme Court disagreed, disapproving of *People v. Hart*, *supra*, and followed the holding of *People v. Cummins* (2005) 127 Cal.App.4th 667, where the reviewing court concluded the jury need not be instructed that a premeditated attempt to murder must have been a natural and probable consequence of the target offense. (*Favor, supra,* 54 Cal.4th at pp. 872, 879, fn. 3.) Thus, as a general proposition, *Favor* does not require a trial court to instruct a jury that it must find that the direct perpetrator of the attempted murder has acted willfully, deliberately, and with premeditation, in order to find the aider-abettor liable for attempted murder that is premeditated. Nor does that case

require a trial court to instruct a jury on the natural and probable consequences doctrine when that doctrine is not implicated by the evidence or the theory relied upon by the prosecution.

Here, the trial court properly instructed the jury on the elements of attempted murder, the requisites for a finding that the attempted murder was willful, deliberate, and premeditated, and the legal principles pertinent to liability as an aider-abettor. (CALCRIM Nos. 401, 600, 601.) During summation to the jury, the prosecutor argued that defendant directly aided and abetted an attempted murder, not an assault with a firearm. Specifically, the prosecutor argued that the perpetrator intended to commit that crime, attempted murder, based on defendant's statements that he wanted a phone call or he would clear it out, shut it down, along with the fact that defendant's girlfriend is told to pick the three men up, one of whom (Jermaine Allen) had a firearm concealed. The prosecutor further argued that before or during the commission of the crime, defendant intended to aid and abet the perpetrator in committing that crime and that defendant's words or conduct did, in fact, aid and abet the perpetrator's commission of the crime.

There is substantial evidence to support the prosecution's theory that defendant intended to kill, took steps beyond mere preparation to kill: he announced his intention by stating that all he had to do was to make a telephone call to "take care of it." He made that call, recruiting the services of Jermaine Allen, who brought a rifle. He called his girlfriend, Erica Guillen, to drive himself, Moss, and Allen back to the apartment, where defendant kicked the door of the apartment to lure the occupants outside, then hid in the

bushes, lying in wait for the occupants to come downstairs. While Moss and defendant manually struck the victim and Mauricio, engaging their attention, Jermaine Allen, wearing a white hockey mask, stepped forward and fired the rifle into the chest area of the victim. Defendant directly encouraged, facilitated, aided and abetted the attempted murder, harboring both the specific intent to kill, and committing the requisite acts to constitute the crime.

The natural and probable consequences doctrine would only come into play if the jury believed that the target crime was assault with a firearm, rather than attempted murder. Given the videotape evidence showing a person wearing a white shirt, presumably Eric Moss, removing an object (presumably the weapon) from the trunk of Erica Guillen's vehicle, there was little evidence on which a jury might find that the actual target offense was anything but attempted murder. The jury concluded that the target offense was not an assault, and there is no evidence to support such a theory. The instructions were proper.

2. *The Minutes and Abstract of Judgment Must Be Amended to Reflect the Correct Conduct Credits.*

At the sentencing hearing, the trial court properly applied section 2933.1, which limits worktime credits to 15 percent for persons convicted of violent felonies. Orally, the court awarded 81 days of conduct credit. The minutes of the sentencing reflect the following: "Credit for time served (618 actual + 538 conduct) for a total of 80 days." In the abstract of judgment, under item 13, Credit for Time Served, the total credits are

calculated as 1156 days, comprising 618 actual days, plus 538 local conduct credit. The clerk has checked the box indicating that credits were calculated based on section 2933.1.

The superior court is directed to amend the minutes and the abstract of judgment to conform to the oral pronouncement of judgment.

DISPOSITION

The trial court is directed to amend the minute order, as well as the abstract of judgment, to reflect actual time served in the amount of 618 days, plus 81 days of conduct credit. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

McKINSTER
J.

CODRINGTON
J.